

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

SEX DISCRIMINATION AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE
OF REPRESENTATIVES TO THE BILL AS INTRODUCED.

(Circulated by authority of the Attorney-General
the Hon. Lionel Bowen, M.P.)

SEX DISCRIMINATION AMENDMENT BILL 1989

OUTLINE

The purpose of the Bill is to remove section 41 of the Sex Discrimination Act 1984 which exempts from the operation of the Act discrimination in superannuation on the ground of sex or marital status and to insert a number of more limited exemptions dealing with superannuation practices and to prohibit discrimination by a person exercising a discretion in regard to dependant superannuation benefits to which s41B does not apply. As section 41 also provides an exemption in regard to insurance, the amendments have necessitated that the insurance exemption be rewritten and reinserted.

The major effect of the Bill is to remove most forms of direct discrimination on the grounds of sex and marital status in superannuation practices for new schemes. Where funds are unable to comply with the new obligations under the Bill, the reasonable expectations of the members will be maintained and the discriminatory fund will be allowed to continue. However these funds will not be entitled to admit new members. Further, members of such discriminatory schemes will have to be given an option to obtain "non-discriminatory superannuation benefits" unless an exemption is provided by the Human Rights and Equal Opportunity Commission under s.44 of the Act.

The Bill is drafted so that the amendments will not come into operation until two years after the date of Royal Assent.

FINANCIAL IMPACT STATEMENT

4. The proposals put forward in this Bill should not impact upon government expenditure. However it is anticipated that Commonwealth schemes will be amended in separate legislation to comply with the Act by the time of the commencement of the amending Act. These changes will have some effect on Commonwealth expenditure.

ABBREVIATIONS

5. The following abbreviations are used in this Explanatory Memorandum

Act: The Sex Discrimination Act 1984

Bill: The Sex Discrimination Amendment Bill 1989:

HREOC: The Human Rights and Equal Opportunity Commission

ISC: The Insurance and Superannuation Commission

NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short title etc.

Clause 2: Commencement

This clause provides that the Act will commence after a period of 2 years from the date on which the Act receives the Royal Assent.

Clause 3: Interpretation

Section 4 of the Act is amended by the clause to insert new definitions which are used in the Bill.

Clause 3A:

Section 14 of the Principal Act is amended by inserting new subsection 14(4), which prohibits discrimination in relation to the exercise of a discretion conferring a dependant superannuation benefit. The prohibition applies to such benefits payable in relation to a member of a superannuation fund, not being a member to whom section 41B applies in respect of that fund. Section 14 of the Principal Act deals with discrimination against applicants and employees in regard to the terms and conditions of employment and other matters. The provision provides that, in regard to schemes to which the provision applies, it will be unlawful for a person who

exercises a discretion in relation to the payment of a dependant superannuation benefit to discriminate on the grounds of a person's sex or marital status in the exercise of the discretion.

Clause 4:

This clause repeals section 41 of the Act which provides for an exemption from the operation of the Act in regard to superannuation and insurance. The clause also provides for the substitution of three new sections.

Insurance

The proposed new section 41 reinserts the current exemption in regard to insurance which is currently provided in s 41(4) of the Act. The section has been rewritten to conform with current drafting practices but the scope of the exemption is intended to be the same as the current exemption in this area.

The section provides that Division 1 or 2 of the Act will not apply, in regard to the terms on which an insurance policy is offered or may be obtained, if the discrimination is on the grounds of a person's sex and is based on actuarial or statistical data from a source on which it reasonable for an insurer to rely and where the discrimination is reasonable. An insurance policy is defined to include an annuity, a life assurance policy, an accident insurance policy and an illness insurance policy.

New Superannuation Conditions

The effect of the proposed new section 41A will be to regulate schemes which are not exempted by proposed new section 41B, that is, where a scheme does not close off its membership and offer existing members the option to obtain benefits which comply with section 41A. Schemes which are not exempted by s41B will need to comply with section 41A.

The section provides for an exemption in regard to three particular areas where the discrimination arises on the grounds of the discriminatee's sex or marital status.

The first area of exemption is where the discrimination arises in regard to the use of actuarial or statistical data in superannuation fund conditions. This exemption is reflected in sub-paragraph 41A(2)(c)(i). The exemption reflects the terminology of the insurance exemption in proposed s.41 of the Bill. The provision will enable funds to include in their fund conditions discriminatory provisions which are based on actuarial or statistical data from a source on which it is reasonable to rely. The provisions must be reasonable having regard to the data. The term "superannuation fund conditions" is defined widely to mean the terms and conditions that relate to membership of, or benefits payable from, the superannuation fund.

The second area of exemption is where discrimination arises because the superannuation fund conditions in relation to a "dependent superannuation benefit" do not provide benefits, or provide lesser benefits, for persons who do not have a legal or de facto spouse or do not have a child. This exemption is reflected in sub-paragraph 41B(2)(c)(ii). In the absence of this exemption a single person may have been able to claim that he or she had been discriminated against on the grounds of marital status because the conditions of the fund did not provide such benefits in his or her circumstance while providing such benefits to persons of a different marital status in similar circumstances.

The term "dependent superannuation benefit" is defined to mean a benefit payable under the terms and conditions of the fund to someone other than the member in the event of the member's death or physical or mental incapacity.

The third area of exemption is where the discrimination arises in relation to vesting, preservation and portability of benefits. The exemption is reflected in sub-paragraph 41A(2)(c)(iii). The exemption only deals with "indirect discrimination" as defined in proposed s.41A(4) of the Bill. Direct discrimination on the grounds of sex or marital status

will not be exempted, and should a fund differentiate by reference to a person's sex in regard to these terms or conditions, a person aggrieved would be able to bring a complaint of discrimination under the Act.

The reason for the maintenance of this exemption is primarily because the Government believes that the terms which apply for vesting, preservation and portability are matters that should be addressed under occupational superannuation standards by the ISC. It is thought desirable that where a fund is complying with ISC standards that a person should not be able to make a complaint of discrimination under the Act.

Proposed new 41A(3) defines the meaning of "indirect discrimination" for the purposes of the section. The definition of indirect discrimination for the purposes of the section includes not only discrimination on the basis of sections 5(2) and 6(2) (which define what is usually meant by the term "indirect discrimination") but also to include discrimination by reason of a characteristic that appertains generally or is imputed to persons of a particular sex or marital status. The reason for this "expanded" definition is to remove the possibility that a woman, for example, could challenge the vesting, preservation and portability arrangements of a fund by arguing that it is a characteristic of women (perhaps in regard to a particular industry) that they do not remain in employment as long as men and are therefore discriminated against by reason of their sex. However, as mentioned above, the provision will enable a person to bring a complaint under the Act should a fund provide differing arrangements by direct reference to sex or marital status in regard to vesting, portability and preservation.

Existing superannuation fund conditions

Proposed new section 41B is designed to allow funds which cannot or do not wish to comply with the requirements of section 41A to continue to operate, upon certain conditions, without being liable to complaints of discrimination on the

grounds of sex or marital status. Those conditions are set out in paragraphs 41B(1)(a) and (b) . The provision is drafted in terms of a person who became a member of a fund before the commencement of the section (paragraph 41B(1)(a)) and where that person has had the option to obtain non-discriminatory superannuation benefits (paragraph 41B(1)(b)) or where an exemption has been granted by HREOC. In either case the person will not be discriminated against, for the purposes of Division 1 or 2, if the discrimination is on the grounds of the discriminatee's sex or marital status (subsection 41B(2)).

Proposed subsection 41B(3) provides that the option referred to in proposed sub-section 41B(1) must be exercised within a particular period. The period is defined in proposed subsection 41B(4) to be a period that will end either two months after the day on which the option is made available to the person or, two months after the commencement of the section, whichever is the later. Proposed subsection 41B(5) defines when a person shall be taken to have obtained "non-discriminatory superannuation benefits". This provision defines "non-discriminatory superannuation benefits" for the purpose of subsection 41B(1). A person will be taken to have had such an option if the member has an the option to obtain superannuation benefits that, if he or she had accepted, would have complied with the requirements specified in proposed section 41A.

Repeal of Superannuation exemptions by regulation

Proposed subsection 41C(1) provides that section either 41A or 41B or section 41A and 41B may be repealed in whole or in part by regulations. Subsections 41(2),(3) and (4) provide that a regulation made for the purposes of subsection 41C(1) will commence on a specified date in the regulation but that the date specified shall not be earlier than 12 months after the date of the making of the regulation. The regulation shall only be made after the Minister has consulted representatives of superannuation fund operators and trustees in relation to the making of the regulation. The purpose of these provisions

is to provide that, where such a regulation is to be made, superannuation funds will have a year in which to change their fund rules in order to comply with the Act. It is the intention of the provision that the Minister would consult with the Association of Superannuation Funds of Australia Limited (if the Association is still extant) or its successor body and peak employer representative organisations. It is not intended that the Minister be required to consult with all employer organisations or individual superannuation companies.